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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2210-08T4

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT,
V.

FRANCIS OSEI-AFRIYIE,
DEFENDANT-PETITIONER.

Submitted August 25, 2009 – Decided September 1, 2009

Before Judges Sabatino and Chambers.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Municipal Appeal No. 11-08.

Francis Osei-Afriyie, appellant pro-se.

John T. Lenahan, Salem County Prosecutor, Attorney for respondent (Thomas A. Desimone, Assistant Prosecutor, on the Brief).

PER CURIAM

Defendant Francis Osei-Afriyie, pro se, appeals the Law Division's order dated November 17, 2008. The in question sustained the municipal court's rejection of defendant's application to withdraw his plea of guilty of

refusing to submit to a breath test, N.J.S.A. 39:4-50.2, and to vacate his associated conviction and sentence for the offense. We affirm.

The pertinent chronology is as follows. On the evening of May 28, 2007, defendant was involved in a motor vehicle accident on the New Jersey side of the Delaware Memorial Bridge. Perceiving that defendant might have been driving under the influence of alcohol, a State trooper administered field tests. When defendant failed to perform the field tests to the trooper's satisfaction, defendant was placed under arrest and brought to the State Police barracks in Moorestown.

Once at the barracks, defendant was administered a breath test on the Alcotest device. For a proper reading to be attained, the tested driver must blow at least 1.5 liters of breath into the device for 4.5 seconds. Defendant only produced 0.9 liters for 2.9 seconds and 1.0 liters for 3.0 seconds on his two attempts to blow into the machine. After the second failed attempt, the operator ceased the testing process, perceiving that defendant was purposely refusing to blow sufficient air into the device.

Defendant was charged with refusal to submit to a breath test, in violation of, N.J.S.A. 39:4-50.2. He was also issued four additional summonses for driving while intoxicated, N.J.S.A. 39:4-50; careless driving, N.J.SA. 39:4-97; driving with an open beverage container; N.J.SA. 39:4-51b; and following another vehicle too closely; N.J.S.A. 39:4-89. The charges were referred to the municipal court of Carney's Point.

On September 11, 2007, defendant appeared with counsel in the municipal court and entered a guilty plea to the refusal offense. At the same time, the prosecutor dismissed the four other pending charges. Defendant's guilty plea was conditioned on his ability to seek to reopen the matter and withdraw his guilty plea, depending upon

the New Jersey Supreme Court's then-anticipated opinion in State v. Chun 194 N.J. 54 (2008), addressing the validity of the Alcotest device. The municipal court confirmed with defendant on record that "based on what happens I n the Chun case...there may be something in that opinion from the Supreme Court that would allow your lawyer to come back and argue you may have been able to give a full (breath) sample and that that should be considered by [this] [c]ourt[.]" Defendant acknowledged that he understood that limited condition, affecting the entry of his plea, specifically hinged upon the Chun decision.

During the course of the plea colloquy, defendant provided the following factual basis for a refusal violation:

THE COURT: Mr. Osei-Afriyie, how do you plead to a refusal to take a breath test on May 28th, 07?

DEFENDANT: Guilty.

THE COURT: And is the plea voluntary?

DEFENDANT: Yes, please.

THE COURT: Is anybody forcing you to plead guilty.

DEFENDANT: No, no, no.

THE COURT: And you understand that this is going to be stayed in order to get a decision from the New Jersey Supreme Court on the Alcotest?

DEFENDANT: Yes.

THE COURT: And did you drive a motor vehicle on May 28th, 07 at approximately 8p.m. on the Turnpike here on Carneys Point at milepost 2.5?

DEFENDANT: Yes.

THE COURT: And you had been drinking prior to driving?

DEFENDANT: Not really. Not at that time. That all- - during the day. About 1:00.

THE COURT: Okay. But- - I- - may be my question was not very artful, but the question is do you- - were you placed under arrest by the trooper on a suspicion of driving under the influence?

DEFENDANT: Yes.

THE COURT: And did they take you to Moorestown Barracks and request that you take a breath test?

DEFENDANT: YES.

THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?

DEFENDANT: Yes.

THE COURT: And that, therefore, that amounts to a refusal.

DEFENDANT: Yes.

Given this factual basis and defendant's voluntary agreement to the plead (*sic*) guilty, the municipal judge entered a judgement of conviction on the refusal violation. The judge revoked defendant's driver's license for 210 days, and also imposed a $305 fine, $33 in costs, $100 DWI surcharge, and twelve hours of mandatory attendance in the IDRC program. The sentence was stayed pending the Supreme Court's decision in Chun.

After the Court's March 2008 opinion in Chun, which sustained the validity of the Alcotest, on July 16, 2008, defendant reappreared in the municipal court, again represented by an attorney. At that second municipal court proceeding, defendant argued that he had not been afforded a sufficient chance to provide an adequate breath sample on the Alcotest device, in accordance with Chun, because of a medical condition that allegedly restricted his ability to exhale. In particular, defendant noted that he had previously undergone two surgeries to address a stricture in his distal esophagus and that, despite that surgery, he was continuing to have problems with esophagitis and throat irritation that adversely affected his breathing. To support that contention, defendant submitted copies of his two operative reports and uncertified letters from his surgeon, Dr. William Kaplan; a pain management specialist, Dr. Ganesh Balu; and his family practitioner, Dr. Andrew Willet.

Dr. Kaplan, in an addendum to his letter, stated that defendant's inability to breathe enough air into the Alcotest device "could be in part explained by his severe esophagitis that has been treated recently." Dr. Balu noted in his letter that in his "professional opinion...severe throat/laryngeal pain can affect a patient's ability to perform deep exhalation secondary to pain inhibition." Lastly, Dr. Willet stated that, as of June 2007, defendant had been "recently treated for throat irritation and cough."

The municipal judge at the rehearing considered these contentions, including the letters from the three physicians and associated medical documents. The municipal judge also heard testimony from the trooper who had arrested defendant and had observed defendant being placed on the Alcotest device by the operator at the Moorestown barracks. The arresting trooper testified that he perceived that, based upon defendant's demeanor and his interactions, defendant was not being cooperative in providing an adequate breath sample.

Defense counsel further argued that Chun required the operator to provide defendant with more attempts, up to eleven, to provide adequate breath samples, and the defendant's medical condition had not been fairly taken into account in deeming his incomplete efforts, after two attempts, a refusal violation. Consequently, the defense maintained that the guilty plea and conviction should be vacated.

Having considered these proofs and the arguments of counsel, the municipal judge rejected defendant's application to vacate his plea. The judge found no manifest injustice present to warrant such relief. In his oral ruling, the municipal judge noted:

The defendant voluntarily pled guilty in this court on September 11th, '07, he pled guilty and his attorney did an excellent job of convincing the Prosecutor that he could not prove the driving under the influence. That charge was dismissed. The Chun stay was issued. But I do not believe there's been manifest injustice. I do not believe the facts support, in any way, a conclusion that Mr. Osei-Afriyie may not... or cannot give 1.5 liters of volume or blow for 4.5 seconds. There is nothing in the medical records that says that.

At best, there's a general statement by one physician that it is possible that he couldn't give that sample, but,

> of course, we don't deal with possibilities, we deal with probabilities. There is nothing in any medical report that indicates that within a reasonable degree of medical certainty that this defendant could not give 1.5 liters of blow for 4.5 seconds.
>
> I do not see any valid reason to vacate the plea and I will not allow the plea to be vacated.

Defendant appealed the municipal court's final disposition to the Law Division. After hearing oral argument from the State and from defendant, who by that point was representing himself, Judge William Forester sustained defendant's attempt to vacate his guilty plea.

In his letter opinion, Judge Forester independently concluded that defendant had failed to demonstrate manifest injustice to vacate his term of the negotiated plea under Rule 3:9-3 and Rule 7:6-2(b). Rejecting defendant's interpretation of Chun, Judge Forester sustained the municipal court's finding that the proofs were insufficient to demonstrate that the defendant was "incapable of providing the required breath sample due to a medical condition." Judge Forester also rejected defendant's argument, one which was not presented to the municipal court, that his guilty plea must be vacated because at the post-Chun hearing the State failed to produce the Alcotest operator or three of the so-called "foundational" documents generally called for by Chun in Alcotest cases that go to trial.

On appeal to this court, defendant argues the following points:

> POINT I
>
> WHETHER BY LAW, NOT GIVING A FULL ENOUGH SAMPLE OF ONE'S BREATH IN ORDER TO REGISTER A PROPER READING

AMOUNTS TO A REFUSAL TO SUBMIT TO THE BREATHALYZER TEST WITHIN THE MEANING OF N.J.S.A. 39:4-50 [.4(a)] AND IN CONTRAVENTION OF N.J.S.A. 39:4-50.2

POINT II

WHETHER THE LAW DIVISION CRITICALLY EXAMINED THE RECORD AT CARNEYS POINT MUNICIPAL COURT

POINT III

ASSUMING THERE WAS A PLEA BARGAINING, AND THERE WAS NOT, WHETHER THE PLEA WAS ERRONEOUSLY ACCEPTED

POINT IV

WHETHER DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED

We have fully considered the arguments raised on appeal. Having done so, we affirm defendant's conviction and sentence, substantially for the reasons expressed by Judge Forester's letter opinion of November 7, 2008. We add only a few amplifications.

Rule 7:6-2(b) states that a motion to withdraw a guilty plea in municipal court "shall be made before sentencing," although the court may allow the motion to be made at a later time "to correct a manifest injustice." See also R. 3:9-3(3). A

Defendant's application to withdraw a guilty plea is viewed more stringently when it is made after, as opposed to before, sentencing. State v. Slater, 198 N.J. 156 (2009).

We recognize that defendant's guilty plea here to the refusal violation was expressly conditioned on the Supreme Court's then-forthcoming decision in Chun. However, we agree with the Law Division and the municipal court that defendant's reliance upon Chun is unpersuasive on its merit.

We also reject defendant's contention that the Chun opinion's factual references to the Alcotest device's capacity to accept "a maximum of eleven attempts to collect two breath samples," id. at 81, requires operators to administer as many as Previously, in State v. Widmairer, 157 N.J. 475, 498 (1999), the Court recognized that where a motorist suspected as a drunk driver verbally assents to submit to a breath test, but whose subsequent actions fail to carry out the requirements of the test, may be guilty of a refusal despite his words. For example, in State v. Geller, 348 N.J. Super. 359 (Law Div. 2001), the court upheld the refusal conviction of a motorist who failed after six attempts to provide an adequate breath sample to a police officer, even though defendant professed that he was trying to cooperate with the testing. Chun changed none of this established law in construing the meaning of the refusal statute.

Defendant misreads Chun in arguing that the case requires a police officer to administer the Alcotest at least three times in attempting to extract a breath sample. Defendant points to passages on page 81 of Chun, which state that "[i]f the measurements for the first breath test are out of accepted range of tolerance with the measurements for the second breath test, the [Alcotest] machine prompts the operator to conduct a third breath test. Depending upon the relationship among the three tests, the results are reported." Chun, supra, 194 N.J. at 81 (emphasis added). The references in Chun to "three tests" do not concern a situation like the present case involving a subject who provides inadequate breath samples, but instead explicitly

deal with other situations in which sufficient breath is provided to generate a blood-alcohol (BAC) reading, but that the reading is "out of the accepted range of tolerance." Ibid. At a later point in its opinion, the Court explains the meaning of "accepted tolerance," which relates to whether the reported BAC reading is within (plus or minus) certain parameters. Id. at 109-115.eleven attempts before declaring the subject's conduct a refusal. To the contrary, if the operator is unable to extract proper samples within three minutes, one of the authorized options is for the operator to report that the subject refused the test. Ibid. Here, we discern no abuse of discretion or manifest injustice in the operator's decision to stop the process after two tests.

Defendant also has no entitlement to relief from that part of Chun directing the State to modify the Alcotest testing procedures so that elderly women over age sixty are only obligated to provide a minimum volume of 1.2 liters of breath rather than 1.5 liters. Id. at 104, 152. The Court was quite explicit in limiting that proviso to elderly women only. In any event, the Court also clearly directed that "for all subjects, regardless of age or gender" a subject must maintain "a minimum 4.5 second blowing time." Id.at 152. Defendant failed to comply with this requirement.

We recognize that defendant presented letters from his physicians and operative reports attempting to provide a medical justification for his failure to blow sufficient air into the device. However, as the municipal judge and Judge Forester both noted, the physicians did not expressly opine within a reasonable degree of medical probability that defendant physically lacked the capacity to blow the required 1.5 liters of air over 4.5 seconds. The court had ample grounds to find the medical documents insufficient to support defendant's claims.

With respect to the so-called "foundational documents" identified in Chun, supra, at 134-45, and the State's non-production of the Alcotest operator at the plea withdrawal

hearing, we sustain the denial of relief to defendant for several reasons. First, defendant did not raise this argument in municipal court. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973). Second, the post-Chun proceeding in the municipal court was not a trial involving rights of confrontation but rather a post-sentencing hearing on an application to withdraw a guilty plea.

Defendant's remaining legal and constitutional arguments lack sufficient merit to warrant discussion.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2210-08T4
MOTION NO. M-00400-09